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Datin Dr Teoh Su Lin v Arjun Gopal Subramaniam

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1175–06 OF 2021
KAMALUDIN MD SAID, HASHIM HAMZAH AND COLLIN LAWRENCE SEQUERAH JJCA
19 MARCH 2024

C

Tort — Negligence — Medical negligence — 14-year-old boy sought treatment for blunt trauma injury to right eye sustained during sports — Consultant ophthalmologist ('appellant') at private hospital misdiagnosed boy's condition and put him on course of steroids for several months — Boy's vision in right eye never D *improved but deteriorated to very low level — Boy subsequently discovered, after consulting other specialists, that he had total retinal detachment, steroid-induced cataract and glaucoma and high intraocular pressure — Boy underwent surgeries to re-attach retina and fix his cataract but continued to suffer partial loss of vision in eye and glaucoma — Whether boy would not have suffered the residual* E *conditions if appellant had not breached her duty of care to him in terms of diagnosis, treatment and advice — Whether damages boy had suffered was reasonably foreseeable to appellant and she was liable to compensate him for the same*

F The appellant was at all material times a consultant ophthalmologist in a hospital ('SJMC') owned, managed and operated by Subang Jaya Medical Centre Sdn Bhd ('D1'). In late August/early September of 2008, she began treating the respondent ('R'), who was then aged 14 years, for a blunt trauma injury to his right eye sustained during a tennis match. The appellant G diagnosed R as having panuveitis with a shallow Exudative Retinal Detachment ('ERD') confined mainly to the nasal, superior and inferior retina and put him on a course of steroids together with pain-relief and topical medications. About three months later, and still having poor vision in his injured eye, R returned to SJMC but because the appellant was on leave, he saw H another eye specialist, PW6, at the hospital who told R after examining him that his retinal detachment was serious and required prompt surgical repair. R's admission and surgery dates were fixed but when R's parents subsequently consulted the appellant, she disagreed with PW6's diagnosis and advised R not to undergo the surgery as it could make him blind. R was told to continue with I the steroid treatment. Three weeks passed and since there was no improvement in R's vision, the appellant referred R to her mentor, consultant opthalmologist, Dr Pall Singh ('D4') who practised at The Tun Hussein Onn National Eye Hospital ('D3') for a second opinion. Reassured by D4's agreement with the appellant's diagnosis, R continued with the appellant's plan

of treatment. At that juncture, the appellant found from an examination of R's right eye that 20% of his retina was still detached, that the vision was 6/9, there was reduction in inflammation and that the intraoccular pressure ('IOP') was 14mmHg. For the next several months, the appellant continued to prescribe steroids to R but the vision in his injured eye continued to deteriorate to a point where he could only count the fingers on a hand from a few feet away. Alarmed over the boy's condition, R's parents took him to another eye centre ('ISEC') for consultation. The eye specialists/surgeons there found that R had suffered total detachment of the retina, cataract ('PSC') caused by prolonged steroid use, steroid-induced glaucoma and high IOP. In October 2009, more than a year after he sustained his eye injury, R underwent surgeries done by the ISEC doctors to re-attach his retina, remove his cataract and implant replacement lens. Treatment was also commenced to manage his glaucoma and high IOP. Post-operatively, R continued to suffer from advanced glaucoma and partial blindness in his right eye. R filed a medical-negligence suit jointly against the appellant, D1, D3 and D4 for damages. Without admission of liability, D1, D3 and D4 entered into a consent judgment to pay R certain *ex gratia* payments in full settlement of his claims against them. R's claim against the appellant proceeded to trial. R contended that the appellant had misdiagnosed his condition by finding that he had only suffered ERD (which did not require surgical treatment) and not RRD (which required surgery to rectify). The prolonged use of steroids prescribed by the appellant had also caused the PSC and glaucoma. In her defence, the appellant denied that R's partial vision loss was caused by the steroids she had prescribed and claimed that the steroids had actually improved R's vision. The High Court found the appellant liable and ordered her to pay R RM200,000 in general damages for pain and suffering and loss of amenities of life, RM33,324 as special damages, RM400,000 as aggravated damages and RM500,000 for future general damages apart from RM300,000 in costs. The trial judge found that the appellant had breached her duty of care to R when she, inter alia: (a) misdiagnosed his injury and failed to recognise the signs and symptoms of RRD; (b) failed to use available diagnostic tools to properly determine the nature of R's eye affliction; (c) failed to reconsider her diagnosis after knowing of PW6's diagnosis; (d) prevented R from going for the surgery recommended by PW6; and (e) failed to monitor R's IOP and to take steps that could have prevented him from getting glaucoma. In the instant appeal, the appellant rehashed issues she had raised below, namely that: (i) she was not the cause of the residual injuries that R suffered from; (ii) the expert witness who testified in R's favour could be regarded as a competent and independent expert by reason of his lack of qualification and experience; (iii) the *ex gratia* payments that R had received from the other defendants under the consent judgment had effectively extinguished his claim for damages against the appellant; and (iv) the trial judge had misapplied the standard of care.

Held, unanimously dismissing the appeal against liability, reducing the award

for general damages to RM100,000, setting aside the awards for aggravated damages and future general damages and retaining the awards for special damages and costs:

(1) The terms of the consent judgment clearly showed that the sum agreed upon and paid by the other defendants to R was not intended to be in full satisfaction of R's claim against all the defendants inclusive of the appellant. The other defendants entered into the consent judgment without admission of liability and the payments they made to R were *ex gratia* in full and final settlement of his claims against them. The absence in the consent judgment of an express reservation by R to proceed with his right to sue the appellant bore no significance since R was entitled to do so even without making such an express reservation (see paras 89–91).

(2) The appellant's contention that the trial judge had failed to apply the correct standard of care in the instant case had no merit. The trial judge had correctly referred to the Federal Court case of *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438 pertaining to the correct standard of care to be applied in medical negligence cases in Malaysia and she had applied the correct principles of law when she addressed the legal and factual issues that arose for determination in the instant case (see paras 101–103).

(3) There was no reason to disturb the trial judge's finding that Dr Manoharan a/l Shunmugam (PW10), whom R had called as his expert witness was competent and qualified as an expert to testify on the issues that were before the court. The trial judge had found that Dr Manoharan was not only a consultant ophthalmologist, like the appellant, but was also a paediatric vitreoretinal surgeon qualified in VR procedure including complex retinal detachment repairs, macular translocations and diabetic de-laminations (see paras 105–107).

(4) There was no reason to disturb the trial judge's rejection of/departure from the evidence given by the appellant's expert witness, DW3 because the trial court found some opinions of DW3 unreasonable and incapable of withstanding logical analysis, such as: (a) when DW3 supported the appellant's diagnosis of ERD despite PW6 finding the presence of 'tobacco dust' in R's eye which was indicative of the more chronic retinal detachment, RRD; and (b) when DW3 contended that the steroids prescribed by the appellant to R were warranted and acceptable, contrary to the trial judge's finding that the steroid doses were excessive (see paras 109–113).

(5) This court agreed with the trial judge that the appellant was responsible for putting an end to R's early chance of recovering vision in his right eye by maintaining that surgery was not necessary. The trial court had also found that the prolonged steroid use prescribed by the appellant had

caused R to suffer the PSC and glaucoma. Based on the evidence, the appellant was aware of the inherent and material risk in her treatment but failed to inform R about it. The trial judge's finding that the steroids prescribed to R by the appellant were excessive was supported by the opinion of R's expert, PW10. As such, the injury suffered by R was foreseeable to the appellant, but she failed to inform him of the material risk. It was therefore clear that 'but for' the appellant's breaches of her duty of care towards R in terms of diagnosis, treatment and advice, R would not have suffered the PSC, glaucoma and partial loss of vision in his right eye. Causation between R's injury and the breach of the appellant's duty of care was thus established (see paras 124–130).

(6) The special damages awarded to R were affirmed because it was supported by evidence. The general damages award of RM200,000 was manifestly excessive. On the facts of the present case, RM100,000 was a fair and reasonable figure. The award for aggravated damages was set aside because it was not pleaded for whilst the award for future general damages was set aside for being purely speculative and lacking in evidence (see paras 137–141).

[Bahasa Malaysia summary

Perayu pada setiap masa material adalah pakar perunding oftalmologi di hospital ('SJMC') yang dimiliki, diurus dan dikendalikan oleh Subang Jaya Medical Centre Sdn Bhd ('D1'). Pada akhir Ogos/awal September 2008, dia mula merawat responden ('R'), yang ketika itu berumur 14 tahun, kerana kecederaan trauma tumpul pada mata kanannya yang dialami semasa perlawanan tenis. Perayu mendiagnosis R sebagai mengalami panuveitis dengan Detasmen Retina Eksudatif ('ERD') kecil yang bertumpu terutamanya pada hidung, superior dan inferior retina dan meletakkannya dalam rawatan steroid bersama ubat penahan sakit dan topikal. Kira-kira tiga bulan kemudian, dan masih mengalami penglihatan yang lemah pada mata yang cedera, R kembali ke SJMC tetapi kerana perayu sedang bercuti, dia berjumpa seorang lagi pakar mata, PW6, di hospital yang memberitahu R selepas memeriksanya bahawa detasmen retinanya adalah serius dan memerlukan pembedahan pembaikan segera. Tarikh kemasukan dan pembedahan R telah ditetapkan tetapi apabila ibu bapa R kemudiannya berunding dengan perayu, dia tidak bersetuju dengan diagnosis PW6 dan menasihatkan R supaya tidak menjalani pembedahan kerana ia boleh menyebabkan dia buta. R diberitahu untuk meneruskan rawatan steroid. Tiga minggu berlalu dan memandangkan tiada peningkatan dalam penglihatan R, perayu merujuk R kepada mentornya, pakar mata perunding, Dr Pall Singh ('D4') yang beramal di Tun Hussein Onn National Eye Hospital ('D3') buat pendapat kedua. Diyakinkan dengan persetujuan D4 dengan diagnosis perayu, R meneruskan rancangan rawatan perayu. Pada ketika itu, perayu mendapati daripada pemeriksaan mata kanan R bahawa 20% daripada retinanya masih tercabut, penglihatan adalah 6/9,

terdapat pengurangan keradangan dan tekanan intraokular ('IOP') adalah 14mmHg. Untuk beberapa bulan berikutnya, perayu terus memberikan steroid kepada R tetapi penglihatan pada mata yang cedera terus merosot sehingga satu tahap di mana dia hanya boleh mengira jari pada tangan dari jarak beberapa kaki. Bimbang dengan keadaan budak itu, ibu bapa R membawanya ke pusat mata lain ('ISEC') untuk berunding. Pakar mata/pakar bedah di sana mendapati R telah mengalami detasmen total retina, katarak ('PSC') yang disebabkan oleh penggunaan steroid yang berpanjangan, glaukoma akibat steroid dan IOP yang tinggi. Pada Oktober 2009, lebih setahun selepas dia mengalami kecederaan mata, R menjalani pembedahan yang dilakukan oleh doktor ISEC untuk memasang semula retinanya, mengeluarkan katarak dan kanta ganti implannya. Rawatan juga dimulakan untuk menguruskan glaukoma dan IOP yang tinggi. Selepas pembedahan, R terus mengalami glaukoma lanjutan dan buta separa di mata kanannya. R memfailkan saman kecuaian perubatan secara bersama terhadap perayu, D1, D3 dan D4 untuk ganti rugi. Tanpa pengakuan liabiliti, D1, D3 dan D4 membuat penghakiman persetujuan untuk membayar R pembayaran *ex gratia* tertentu sebagai penyelesaian penuh tuntutannya terhadap mereka. Tuntutan R terhadap perayu diteruskan ke perbicaraan. R berhujah bahawa perayu telah salah mendiagnosis keadaannya dengan mendapati dia hanya mengalami ERD (yang tidak memerlukan rawatan pembedahan) dan bukannya RRD (yang memerlukan pembedahan untuk membetulkannya). Penggunaan steroid yang berpanjangan yang ditetapkan oleh perayu juga telah menyebabkan PSC dan glaukoma. Dalam pembelaannya, perayu menafikan bahawa kehilangan penglihatan separa R adalah disebabkan oleh steroid yang telah ditetapkannya dan mendakwa bahawa steroid itu sebenarnya telah meningkatkan penglihatan R. Mahkamah Tinggi mendapati perayu bertanggungjawab dan memerintahkan dia membayar R RM200,000 sebagai ganti rugi am untuk kesakitan dan penderitaan serta kehilangan kemudahan hidup, RM33,324 sebagai ganti rugi khas, RM400,000 sebagai ganti rugi teruk dan RM500,000 untuk ganti rugi am masa depan selain kos RM300,000. Hakim perbicaraan mendapati perayu telah melanggar tugas berhati-hati R apabila dia, antara lain: (a) salah mendiagnosis kecederaannya dan gagal mengenali tanda dan gejala RRD; (b) gagal menggunakan alat diagnostik yang ada untuk menentukan dengan betul sifat penyakit mata R; (c) gagal mempertimbangkan semula diagnosisnya selepas mengetahui diagnosis PW6; (d) menghalang R daripada menjalani pembedahan yang disyorkan oleh PW6; dan (e) gagal memantau IOP R dan mengambil langkah yang boleh menghalangnya daripada mendapat glaukoma. Dalam rayuan semasa, perayu telah mengulangi isu yang dibangkitkannya di bawah, iaitu: (i) dia bukanlah punca baki kecederaan yang dialami oleh R; (ii) saksi pakar yang memberi keterangan memihak kepada R boleh dianggap sebagai seorang yang cekap dan pakar bebas atas sebab kekurangan kelayakan dan pengalamannya; (iii) bayaran *ex gratia* yang R telah terima daripada defendan lain di bawah penghakiman persetujuan telah dengan berkesan memadamkan tuntutannya untuk ganti rugi terhadap

perayu; dan (iv) hakim bicara telah menyalahgunakan standard penjagaan. A

Diputuskan, sebulat suara menolak rayuan terhadap liabiliti, mengurangkan award untuk ganti rugi am kepada RM100,000, mengetepikan anugerah untuk ganti rugi teruk dan ganti rugi am masa hadapan dan mengekalkan anugerah untuk ganti rugi dan kos khas: B

(1) Terma penghakiman persetujuan jelas menunjukkan bahawa jumlah yang dipersetujui dan dibayar oleh defendan lain kepada R tidak bertujuan untuk memenuhi sepenuhnya tuntutan R terhadap semua defendan termasuk perayu. Defendan lain membuat penghakiman persetujuan tanpa pengakuan liabiliti dan bayaran yang mereka buat kepada R adalah *ex gratia* dalam penyelesaian penuh dan muktamad tuntutannya terhadap mereka. Ketiadaan dalam penghakiman persetujuan bagi pengakuan nyata oleh R untuk meneruskan haknya untuk menyaman perayu tidak bermakna kerana R berhak berbuat demikian walaupun tanpa membuat pengakuan nyata sedemikian (lihat perenggan 89–91). C D

(2) Pendapat perayu bahawa hakim perbicaraan telah gagal menggunakan standard penjagaan yang betul dalam kes semasa tidak mempunyai merit. Hakim perbicaraan telah merujuk dengan betul kes Mahkamah Persekutuan *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438 berkaitan standard penjagaan yang betul untuk digunakan dalam kes kecuaian perubatan di Malaysia dan dia telah menggunapakao prinsip undang-undang yang betul apabila beliau menangani isu undang-undang dan fakta yang timbul untuk penentuan dalam kes semasa (lihat perenggan 101–103). E F

(3) Tiada sebab untuk mengganggu dapatan hakim perbicaraan bahawa Dr Manoharan a/l Shunmugam (PW10), yang dipanggil R sebagai saksi pakarnya adalah kompeten dan layak sebagai pakar untuk memberi keterangan mengenai isu-isu yang dihadapi mahkamah. Hakim perbicaraan mendapati Dr Manoharan bukan sahaja pakar mata perunding, seperti perayu, tetapi juga pakar bedah vitreoretinal pediatrik yang berkelayakan dalam prosedur VR termasuk pembaikan detasmen retina kompleks, translokasi makula dan de-laminasi diabetes (lihat perenggan 105–107). G H

(4) Tidak ada sebab untuk mengganggu penolakan/keluar daripada keterangan yang diberikan oleh saksi pakar perayu, DW3 kerana mahkamah perbicaraan mendapati beberapa pendapat DW3 tidak munasabah dan tidak mampu menahan analisis logik, seperti: (a) apabila DW3 menyokong diagnosis ERD perayu walaupun PW6 mendapati kehadiran 'habuk tembakau' dalam mata R yang menunjukkan detasmen retina yang lebih kronik, RRD; dan (b) apabila DW3 menegaskan bahawa steroid yang ditetapkan oleh perayu kepada R I

adalah wajar dan boleh diterima, bertentangan dengan keputusan hakim bicara bahawa dos steroid adalah berlebihan (lihat perenggan 109–113).

(5) Mahkamah ini bersetuju dengan hakim perbicaraan bahawa perayu bertanggungjawab untuk menamatkan peluang awal R untuk memulihkan penglihatan mata kanannya dengan mengekalkan bahawa pembedahan tidak perlu. Mahkamah perbicaraan juga telah mendapati bahawa penggunaan steroid berpanjangan yang ditetapkan oleh perayu telah menyebabkan R mengalami PSC dan glaukoma. Berdasarkan keterangan, perayu menyedari risiko yang wujud dan material dalam rawatannya tetapi gagal memaklumkan R mengenainya. Dapatan hakim perbicaraan bahawa steroid yang ditetapkan kepada R oleh perayu adalah berlebihan disokong oleh pendapat pakar R, PW10. Oleh itu, kecederaan yang dialami oleh R boleh diramalkan oleh perayu, tetapi dia gagal memaklumkan kepadanya tentang risiko material. Oleh itu adalah jelas bahawa 'tetapi untuk' pelanggaran kewajipan perayu terhadap R dari segi diagnosis, rawatan dan nasihat, R tidak akan mengalami PSC, glaukoma dan kehilangan penglihatan separa pada mata kanannya. Punca di antara kecederaan R dan pelanggaran kewajipan penjagaan perayu telah ditetapkan (lihat perenggan 124–130).

(6) Ganti rugi khas yang diberikan kepada R telah disahkan kerana ia disokong oleh keterangan. Pemberian ganti rugi am sebanyak RM200,000 adalah nyata berlebihan. Mengenai fakta kes ini, RM100,000 adalah satu angka yang adil dan munasabah. Award untuk ganti rugi teruk telah diketepikan kerana ia tidak dirayu sementara award untuk ganti rugi am masa hadapan telah diketepikan kerana hanya spekulatif dan kekurangan bukti (lihat perenggan 137–141).]

Cases referred to

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, QBD (refd)

Bolitho v City and Hackney Health Authority [1997] 3 WLR 1151, HL (refd)

Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal [2018] 1 MLJ 685; [2017] 10 CLJ 529, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)

Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals [2017] 1 MLJ 328; [2017] 2 CLJ 274, CA (refd)

Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Khaw Poh Chhuan v Ng Gaik Peng & Ors [1996] 1 MLJ 761; [1996] 2 CLJ 185, FC (refd)

Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd [2017] 3 MLJ 763; [2017] 5 CLJ 58, CA (folld)
Nur Farzana Aida bt Faizal (claiming through his father, Faizal bin Mad Saat) & Ors v Kerajaan Malaysia [2021] MLJU 2423; [2022] 1 CLJ 692, CA (refd)
Rogers v Whitaker (1992) 175 CLR 479, HC (refd)
Taff Hotels Sdn Bhd v Permodalan Nasional Bhd [2000] 4 MLJ 622, HC (folld)
Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465; [2004] 2 CLJ 301, FC (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22; [1985] CLJ Rep 323, SC (refd)
Tenaga Nasional Bhd (TNB) v Evergrowth Aquaculture Sdn Bhd and other appeals [2021] 5 MLJ 937; [2021] 9 CLJ 179, FC (refd)
UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)
Vanden Recycling Ltd v Kras Recycling BV [2017] EWCA Civ 354, CA (folld)
Yong Teck Lee v Harris Mohd Salleh & Anor [2009] 6 MLJ 437; [2010] 1 CLJ 156, FC (refd)
Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors [2017] 5 MLJ 438; [2017] 8 CLJ 605, FC (refd)

Legislation referred to

Rules of High Court 1980 (repealed by Rules of Court 2012) O 59
Rules of Court 2012 O 59 r 16(1)

Appeal from: *Arjun Gopal Subramaniam v Subang Jaya Medical Centre Sdn Bhd & Ors* [2022] MLJU 1406 (High Court, Kuala Lumpur)

Manmohan S Dhillon (with KB Karthi and Desmond Mun) (PS Ranjan & Co) for the appellant.
PA Sharon (Palani Ammal & Co) for the respondent.

Hashim Hamzah JCA:

INTRODUCTION

[1] For ease of reference, parties to the present appeal shall be referred as they were before the trial court below.

[2] This is the second defendant's appeal against the decision of the learned trial judge who had allowed the plaintiff's medical negligence claim against the second defendant. This appeal is against liability and quantum of damages.

A BACKGROUND FACTS

[3] The learned trial judge has thoroughly set out the background facts in her grounds of judgment. We respectfully adopt them with some modifications we deem necessary.

B

[4] The plaintiff was 14 years old when he suffered a blunt trauma injury to his right eye during a tennis match on 30 August 2008. The plaintiff was taken to Klinik Putra Perdana to receive treatment. The attending doctor at the clinic advised him to see a specialist. In his evidence, the plaintiff said he experienced a temporary loss of vision for about 45 minutes.

C

[5] The plaintiff then went to emergency department at Subang Jaya Medical Centre ('SJMC') for treatment. Dr Salinder Kaur a/p Sauram Singh ('PW4'), who was on duty at that time, attended to the plaintiff. The plaintiff complained of impaired vision for 45 minutes. PW4 could not recall whether the plaintiff had told her that he had suffered loss of vision.

D

[6] The plaintiff was diagnosed as having a blunt injury to the right eye by PW4. It was noted that the plaintiff's vision on the right side, which was impaired, was 6/18. The plaintiff was short-sighted and needed glasses, but he did not bring his glasses on that day. The right eye was tender, the pupil was dilated, and it was not reacting to light. The conjunctiva of the right eye was congested. PW4 did a staining test, and the result was negative. The cornea was noted to be clear, and there was no hyphaemia noted in the right eye.

E

F

[7] PW4 was not an ophthalmologist. PW4 called up the second defendant to discuss further treatment and any other investigations that she needed to do. The second defendant was (and still is) a consultant ophthalmologist at SJMC, which is owned, managed, and operated by the first defendant. According to PW4, she had written down in the notes whatever was advised to her by the second defendant.

G

H

[8] On the instruction of the second defendant, PW4 prescribed steroids and pain relief to the plaintiff. The second defendant had also instructed PW4 to get the plaintiff back the next day to review his eye.

I

[9] On the next day, PW4 saw the plaintiff again. PW4 said the plaintiff came back with his glasses, and his vision in the right eye was 6/6, which was normal. The plaintiff was to continue the medication prescribed the day before. He was also given two days of medical leave and an appointment to see the second defendant on 2 September 2008.

[10] On 2 September 2008, the plaintiff sought treatment with the second defendant, who was the first ophthalmologist that the plaintiff had seen. A

[11] The second defendant had conducted an examination on the plaintiff in the presence of the plaintiff's parents, PW2 and PW3. The second defendant's diagnosis was *panuveitis,* with a shallow exudative retinal detachment ('ERD') confined mainly to the nasal, superior, and inferior retina. B

[12] The second defendant said that there was a traumatic mydriasis of the right eye with microscopic hyphaema, in which the right eye will be more sensitive to light for a while, but there will be no serious injury. The second defendant prescribed topical medication to the plaintiff. However, the plaintiff was not given any appointment date for a follow-up. C

[13] Some three months had passed, and the plaintiff claimed to still have a problem with his right vision. On 17 December 2008, the plaintiff sought treatment at Poliklinik Ludher. He was again referred to SJMC. D

[14] On 18 December 2008, the plaintiff went to SJMC to see the second defendant, but she was on leave on that day. The plaintiff saw Dr Ahmad Fauzi bin Md Sharif ('PW6'), who was the next available specialist. E

[15] During his examination of the plaintiff's right eye, PW6 noticed subtotal retinal detachment and found a significant presence of 'tobacco dust', also known as the Shafer sign. PW6 diagnosed the plaintiff's condition as right retinal detachment. PW6 suggested a surgical intervention in the next few days because he was sure that there was a retinal break. F

[16] Emergency surgery consent was taken from PW2 for the plaintiff's admission on 22 December 2008 and emergency post-vitrectomy GA on 23 December 2008. PW6 prescribed Prednisolone to the plaintiff, which is a steroid. G

[17] In view of the differing diagnosis, the plaintiff and his parents visited the second defendant again on 19 December 2008. The second defendant was consulted about PW6's diagnosis. The plaintiff's parents were afraid to rush in for the surgery proposed by PW6. H

[18] During this visit, the second defendant examined the plaintiff's right eye again. The second defendant disagreed with PW6's diagnosis and stood by her earlier diagnosis. The second defendant called PW6. According to the plaintiff, the second defendant informed PW6 that his diagnosis was wrong. I

The second defendant also informed the plaintiff that if he went ahead with the surgery, the plaintiff could go blind. The second defendant further prescribed steroids to the plaintiff.

[19] On 22 December 2008, the plaintiff had a follow-up with the second defendant. It was noted that the plaintiff's vision was 6/18. The second defendant's diagnosis was:

AC – flare+

- cells +

Shallow exudative detachment

Vitreous Cells ++

[20] The second defendant prescribed steroids to the plaintiff.

[21] On the same day, the second defendant referred the plaintiff to Dr Raveendran a/l C Ramachandran ('PW2') to see whether there was any cause for his panuveitis and to rule out any systemic autoimmune disease.

[22] On 27 December 2008, the plaintiff saw the second defendant again. The plaintiffs vision then was 6/18. The second defendant's diagnosis was as follows:

A/C fiare min

Cells+

Vitreous Cells+

Shallow RD

[23] The second defendant prescribed steroids to the plaintiff.

[24] On the same day, PW2 told the plaintiff and his parents that from his clinical examination, the plaintiff did not have any autoimmune disease. PW2 reverted the plaintiff to the second defendant for further management.

[25] On 5 January 2009, the plaintiff met with the second defendant. The plaintiff's vision was 6/18. He complained of seeing flashes of light. The second defendant prescribed steroids to the plaintiff.

[26] On 6 January 2009, PW2 ran a few tests and confirmed that the plaintiff was not suffering from any autoimmune disease. PW2 confirmed that there was no evidence of any autoimmune disease suffered by the plaintiff. PW2 found no signs of inflammation in the body elsewhere and that the inflammation was purely in the plaintiff's right eye.

[27] Since then, the second defendant knew that the plaintiff was not suffering from any autoimmune disease. The problem was localised to the plaintiff's right eye.

[28] On 7 January 2009, the plaintiff's eye did not improve. PW2 decided to refer the plaintiff to Dr Pall Singh, ie, the fourth defendant, for a second opinion. The fourth defendant examined the plaintiff by using Optical Coherence Tomography ('OCT') and found that the plaintiff had suffered exudative retinal detachment ('ERD'). The plaintiff's vision was recorded at 6/12 and 6/9 with glasses.

[29] PW2, in his evidence, said that he did not see any rhegmatogenous retinal detachment ('RRD') when he saw the plaintiff, but it was ERD instead.

[30] PW2 advised the plaintiff to continue with the second defendant's plan of treatment. The plaintiff was also assured that the second defendant was the fourth defendant's student and that her plan of treatment was correct. Relying on the fourth defendant's assurance, the plaintiff continued with the second defendant's plan of treatment.

[31] The plaintiff went back to the second defendant on 21 January 2009. The plaintiff's case was reviewed, and the following was the second defendant's diagnosis.

[32] The second defendant saw shallow exudation and some yellow nodules. 3/4 of the retina had attached. There was a shallow amount of fluid at the bottom of the retina. The yellow nodules cannot be seen unless the retina has been attached because the yellow nodules are on the choroid. 80% of the retina had attached, whereas the remaining 20% at the bottom was still not attached. His vision was 6/9, and his inflammation was reduced, but the retinal detachment persisted. His eye pressure was 14 mmHg. The second defendant prescribed steroids to the plaintiff.

[33] The plaintiff went for the second defendant's examination several times after that, ie, on 7 February 2009, 7 March 2009, 1 May 2009, and 10 July 2009. Each time, the plaintiff was prescribed steroids by the second defendant. However, the plaintiff's right vision gradually deteriorated.

[34] On 25 August 2009, the plaintiff went to Tun Hussein Onn National Eye Hospital ('THONEH'). He was seen by another doctor there on 25 August 2009 and 26 August 2009. He was subsequently referred again to the fourth defendant on 27 August 2009.

[35] On 27 August 2009, he was seen again by the fourth defendant, during which another OCT was done. The plaintiff's right vision was counting fingers, which means that his right vision was very low. The plaintiff was diagnosed with cataracts and ERD. The plaintiff was prescribed Maxidex, which was also a steroid.

[36] The plaintiff did not have the cataract surgery because his parents wanted to get another opinion as there was still no discernible improvement to the plaintiffs right eye condition.

[37] The plaintiff and his parents then went to the International Specialist Eye Centre ('ISEC'). At the ISEC, the consulted Dr Wong Jun Shyan ('PW11'), Dr Kok Howe Sen ('PW8'), and Dr Fang Seng Kheong ('PW9').

[38] PW11 was a consultant ophthalmologist and consultant vitreoretinal surgeon, PW8 was a consultant ophthalmologist specialising in medical retina and ocular inflammation cases, and PW9 was also a consultant ophthalmologist sub-specialising in glaucomatology.

[39] On 7 September 2009, the plaintiff consulted with PW11. Upon examination, PW11 reached a working diagnosis of a very significant posterior subcapsular cataract ('PSC'), which is commonly related to prolonged steroid use. PW11 noted some hazy views due to cataracts and some inflammation. He also noted steroid-induced glaucoma and high eye pressure of 24 mmHg. The retina was totally detached. PW11 then referred the plaintiff PW8 for a second opinion to confirm his diagnosis of the plaintiff's conditions.

[40] On 8 September 2009, the plaintiff met with PW8. PW8 told the plaintiff to stop the steroid medication since his right eye was in serious condition. PW8 was of the opinion that the plaintiff had most likely suffered RRD. The plaintiff was reverted to PW11.

[41] The plaintiff went back to see PW11 on 14 October 2009. In his evidence, PW11 said that the plaintiffs best vision at that time was counting fingers at three feet only. The plaintiff requested surgery, and PW11 arranged to have the surgery done at Tung Shin Hospital on 15 October 2009.

[42] On 15 October 2009, PW11 conducted retinal detachment surgery on the plaintiff. PW11 said the surgery was straightforward for a complex retinal detachment of this nature. The plaintiffs retina was eventually re-attached.

[43] On 16 October 2009, the vitreous cavity was replaced with silicone oil. The retina was flat, meaning it was no longer detached and had flattened to the

back of the eye. One week later, the retina was still flat, meaning it was successfully re-attached, but the eye pressure was still high. PW11 put the plaintiff on eye drops.

[44] On 3 December 2009, PW11 conducted an operation on the plaintiff to remove the silicone oil from the front part of the eye. PW11 said that it was a straightforward operation, which finished in about five minutes. Post removal of oil, the retina was flat. PW11 said that he had already fixed the retina detail.

[45] On 9 December 2009, the plaintiff went to see PW8, in which cataract surgery and anterior chamber-lens implants were performed.

[46] On 21 October 2011, the plaintiff consulted PW9 for his glaucoma. PW11 referred the plaintiff because the plaintiff's intraocular pressure ('IOP') was high, had glaucoma, and was not able to manage with the medication. PW9's finding was that the plaintiff's IOP was high.

[47] PW9 also attended to the plaintiff in 2012, 2013 and 2017 before the plaintiff left for his medical studies in Tasmania, Australia.

[48] On 14 August 2012, 16 October 2012 and 11 December 2012, the plaintiff received treatment at Kuala Lumpur General Hospital ('KLGH'), where he underwent cyclic diode surgery.

[49] The plaintiff filed this action in August 2014.

SUMMARY OF THE PLAINTIFF'S CLAIM

[50] The plaintiff was under the second defendant's care from 30 August 2008 to 10 July 2009, which was approximately nine months. During this time, it was alleged that the second defendant had prescribed steroids, oral and topical, to the plaintiff.

[51] Apart from the second defendant, the plaintiff also sought treatment from other doctors. These doctors include doctors from the ISEC, the fourth defendant, who was a consultant ophthalmologist at the third defendant hospital, and doctors from the KLGH.

[52] The plaintiff had developed a very significant PSC and glaucoma. The plaintiff currently suffers from advanced glaucoma and partial blindness in his right eye.

[53] The plaintiff claimed that he had sustained retinal detachment as a result of the tennis ball injury. The plaintiff also claimed that there was a misdiagnosis on the part of the second defendant, who failed to diagnose RRD but ERD instead. The plaintiff claimed that the prolonged use of steroids prescribed by the second defendant in her treatment of ED had caused steroid-induced PSC and glaucoma to the plaintiff.

[54] In this action, the plaintiff claimed that the second and fourth defendants had breached their duty of care owed to him, and they were both negligent in their diagnosis and treatment of his right eye. The plaintiff also claimed that both the second and fourth defendants were in breach of their contractual duties as professional consultant ophthalmologists. Against the first and third defendants, the plaintiff claimed that they were vicariously liable for the negligence of the second and fourth defendants, respectively.

[55] On 8 December 2016, a consent order was entered between the plaintiff and the first, third, and fourth defendants without admission to liability. Through the consent order, the plaintiff received *ex gratia* payments from the first, third, and fourth defendants as full settlement for all the claims filed by the plaintiff against them. The *ex gratia* payments were already paid in full.

[56] The plaintiff and the second defendant failed to reach any settlement, and therefore, the plaintiff's claim against the second defendant proceeded to trial.

SUMMARY OF THE SECOND DEFENDANT'S DEFENCE

[57] In her defence, the second defendant contended that the plaintiff's partial loss of vision was caused by the blunt trauma injury to his right eye suffered during a tennis match. The second defendant claimed that the steroids that she prescribed had actually improved the plaintiff's vision and were not the cause for the plaintiff's partial loss of vision.

[58] According to the second defendant, the plaintiff's left eye was not affected, and other doctors who treated the plaintiff had also prescribed steroids. Ultimately, it was claimed that the plaintiff had not proven that it was reasonably foreseeable that the steroids prescribed by the second defendant would cause a partial loss of vision.

PRINCIPLES ON APPELLATE INTERVENTION

[59] The law is trite that an appellate court will not interfere with the findings of fact by the trial court unless the trial court is shown to be plainly wrong, for instance, when the trial court is guilty of no or insufficient judicial

appreciation of evidence (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 (FC), *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 (FC), and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC)).

[60] We agree with His Lordship Harmindar Singh Dhaliwal JCA (now FCJ) in *Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd* [2017] 3 MLJ 763; [2017] 5 CLJ 58 (CA) in which it was held as follows:

> [20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:
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> (a) *where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations* (see *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509; [2010] 3 CLJ 377);
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> (b) *where there was no proper evaluation of the evidence by the trial judge* (see *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626);
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> (c) *where the decision arrived at by the trial court was without judicial appreciation of the evidence* (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309);
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> (d) *where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion* (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87; [2008] 2 CLJ 284);
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> (e) *where the trial judge was plainly wrong in arriving at his decision* (see *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19);
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> (f) *where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him* (see *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693; [2013] CLJU 625; [2013] 1 LNS 625 which followed the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165; [1984] CLJU 40; [1984] 1 LNS 40); and
>
> (g) *where the judgment is based upon a wrong premise offact or of law* (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] CLJU 1416; [2012] 1 LNS 1416). (Emphasis added.)

[61] Bearing the abovementioned principles in mind, we now turn to consider the issues raised by the parties to this appeal.

ISSUES

[62] The second defendant raised a total of 99 issues in her memorandum of appeal. Before us, the core issues to be determined in this appeal have been narrowed down to the following:

(a) there is no evidence to show that the injuries suffered by the plaintiff were caused by any breach of the second defendant's duty of care towards the plaintiff (causation);

(b) the learned trial judge erred when she relied on the evidence of the plaintiff's expert opinion evidence since the plaintiff's expert is not a competent, independent or expert by reason of his lack of qualification and experience;

(c) the consent judgment entered into by the plaintiff with other defendants constitutes a just dismissal of the claim against the second defendant; and

(d) the learned trial judge had misapplied the standard of care (impossibly high and unrealistic standard of care).

OUR FINDINGS

[63] We have gone through the appeal records and heard the submissions by all parties to this appeal. We have come to a unanimous decision, and our decision is set down below.

Preliminary issues

[64] The learned counsel for the second defendant had raised several issues which we believe should be dealt with at the outset before going into the actual merits of the case.

First preliminary issue: Corruption of evidence

[65] The learned counsel for the second defendant submitted that the plaintiff, his witnesses, and his counsel had corrupted evidence and made a fair trial impossible based on the following circumstances.

Allegation of practice, rehearsal or coaching against the learned counsel for the plaintiff

[66] Firstly, the learned counsel for the second defendant submitted that his pupils and junior counsel had seen the learned counsel for the plaintiff and the plaintiff's expert witness 'sat together at the bar table, going through papers and having long conversations' while waiting for the court to resume the proceedings.

[67] The learned counsel for the second defendant hinted that the learned counsel for the plaintiff had rehearsed, practised with, or coached the expert witness based on what his pupils and junior counsel had seen. The learned counsel for the second defendant had further urged this court not to condone such misconduct and an act of contempt of court.

[68] In support, the learned counsel for the second defendant referred to the High Court case of *Taff Hotels Sdn Bhd v Permodalan Nasional Bhd* [2000] 4 MLJ 622. In this case, Steve Shim J (as he then was) had allowed an application to cross-examine the witness regarding the discussions that the witness had with the opposing counsel. In allowing this application, it was held as follows:

> Now, there are of course discussions and discussions. I would not think that a discussion between counsel and his witness during an adjournment in matters of a general nature relating to the case as a whole and which is absolutely essential to an effective prosecution or defence of his case should attract any adverse implications even though it may occasionally and by force ofnecessity transgress into matters arising out of the cross-examination of the witness. Counsel for the defendant has drawn attention to the case *Moomin bin Seman v Public Prosecutor* [1993] 3 MLJ 282 wherein Richard Tallala J cited with approval the observation of Hogan CJ in the Hong Kong case of *Lau Pak Ngam v R* [1966] Crim LR 443 which states:
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> > *If a police officer — or indeed anyone connected with a case — enters unnecessarily into conversation with a witness as to his or her evidence during an adjournment of the witness's testimony, the officerat once exposes himselfand the witness to the suggestion that the evidence subsequently given is in some way affected by such conversation and possibly distorted so as to present a picture more favourable to one side.* (Emphasis added.)

[69] First and foremost, on this issue, we do not have any audio-visual advantage of what had transpired during the alleged incident. It seems that the learned trial judge was not privy to the alleged incident as well, as the incident allegedly happened while the case had not yet been called.

[70] In fact, this issue was literaliy brought to the attention of the learned trial judge during the trial. It can be seen from the notes of evidence that the learned trial judge did ask the learned counsel for the plaintiff to give her

explanation. The learned counsel for the plaintiff admitted to having a conversation with the expert witness but denied having long conversations, rehearsing, or coaching the expert witness. Ultimately, the learned trial judge accepted her explanation and proceeded with the trial.

[71] In her grounds of judgment, the learned trial judge stated:

> [92] Mr PS Ranjan further contended that there was a serious misconduct by Miss PA Sharon for having a long conversation with Dr Manoharan in the courtroom, going through the papers and discussing the case during a break, as observed by his junior counsel and pupils. *Miss PA Sharon admitted to the conversation and gave her explanation. I accept Miss Sharon's explanation that there was no long conversation, no rehearsing or coaching about the case*.
>
> [93] In this regard, if Dr Teoh felt strongly about the alleged misconduct of the learned counsel, she can lodge complaint with the appropriate authorities of the Bar Council or initiate contempt proceedings. *But as I had said, I accepted the explanation offered and thus, I shall not further delved into the matter.* (Emphasis added.)

[72] In the same case that was referred by the learned counsel for the second defendant above, ie, *Taff Hotels Sdn Bhd*, Steve Shim J (as he then was) further held, to which we agree, that:

> *The use of the word 'unnecessarily' would seem to suggest that there is no total prohibition involved and that there are perhaps occasions where conversations or discussions, which are found to be necessary, are allowed.* However, if the discussion is in the nature of coaching a witness in his evidence as to what he is expected to say in the witness-box, then I think, that would be most reprehensible and calls for condemnation in the strongest terms. Here, a specific allegation has been made that there was coaching by counsel for the plaintiff of PW1 in the discussion between them during an adjournment while PW1 was still under cross-examination. In response, counsel for the plaintiff maintains that she did not (to use her own words) 'have any dealings with PW1 behind anybody's back'. What that means is not entirely clear. *She does not specifically refute the allegation raised by counsel for the defendant which naturally opens the door to an inference that there may be some truth in the allegation.* In the circumstances, I think it fair and proper to allow the application. (Emphasis added.)

[73] Based on the above, we are of the considered view that the learned trial judge had rightly addressed this issue when it was raised before her, and she was more than entitled to her decision above. Therefore, we see no reason to disturb the same.

Obstruction of access to PW6

[74] Secondly, the learned counsel for the second defendant submitted that the learned counsel for the plaintiff had unlawfully obstructed his access to PW6, who was on both parties' lists of witnesses.

[75] This issue was already raised before the learned trial judge. The learned trial judge stated:

> [94] On the issue of obstructing access to Dr Fauzi, the incident was over a notice dated 30 August 2017 given to Miss PA Sharon to interview Dr Fauzi. It is to be noted thatArjun had already given notice dated 14 September 2015 that Dr Fauzi was his subpoena witness. *Miss PA Sharon was amenable but requested to be present during the interview. I do not think the request to be present was unreasonable in the circumstances*, as there was material contradiction offacts between the parties'versions of what had transpired between Dr Fauzi and Dr Teoh on 19 December 2008. In any event, Dr Fauzi himself had declined the request to interview him, Thus, there is no obstruction so to speak. (Emphasis added.)

[76] Based on the evidence, we agree with the reasoning of the learned trial judge. There is no reason to disturb the same.

Misuse of witness statements

[77] Thirdly, the learned counsel for the second defendant submitted that the plaintiff's parents, ie, PW2 and PW3, had corrupted the evidence with identical answers to identical questions in their respective witness statements.

[78] This issue was raised before the learned trial judge, and in our view, it has been rightfully dismissed, as can be seen in her grounds of judgment below:

> [95] The complaint by Dr Teoh was that witness statements of PW2 and PW3 gave identical answers to identical questions but strongly denied that theyhad discussed the evidence with each other. Therefore, there is a misuse of witness statements. *It is quite obvious to me that the parents in their witness statements testified to the narratives, describi ng the series ofevents in their joint efforts to seek treatment for their 14 year old son's injured eye who was at ali material time, under their care.*
>
> [96] *The mother said that the witness statements was about their son. The facts were the same, so was the truth. However, there were some differences in her witness statement as compared to her husband*. She gave her version in her witness statement.
>
> [97] In my view, in this context and in the circumstances, *giving identicai answers to identical questions would not be so preposterous or contrary to common sense to the extent that there was any abuse or misuse of the witness statements.* (Emphasis added.)

[79] In our mind, regardless of whether PW2 and PW3's answers in the witness statements are substantially identical to one another, their evidence and credibility may still be challenged during cross-examination by the opposing party. Ultimately, the court shall assess the credibility of their evidence and weigh it against other evidence.

[80] Based on the preceding reasons, we do not find any merit in the issue raised by the learned counsel for the second defendant that there was a corruption of evidence in the present case.

Second preliminary issue: Settlement between the plaintiff and other defendants

[81] The learned counsel for the second defendant submitted that the consent judgment recorded between the plaintiff and the other defendants for the very same damage pleaded against ali the defendants was unfair to the second defendant.

[82] It was further submitted that the consent judgment recorded between the plaintiff and the other defendants should result in the plaintiff's action for the damage that he suffered being fully satisfied and extinguished.

[83] This issue was already raised before the learned trial judge. In her grounds of judgment, the learned trial judge stated:

> [77] In the consent order, the *ex gratia* payment paid to the plaintiff are:
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> (a) RM33,000 inclusive of costs, to be paid by SJMC;
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> (b) RM24,000 inclusive of costs, to be paid by THONEH; and
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> (c) RM70,000 inclusive of costs, to be paid by Dr Pall Singh.
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> [78] Learned counsel for Dr Teoh, Mr PS Ranjan submitted that as Arjun had received the *ex gratia* payments from SJMC the claim against Dr Teoh had been satisfied. This is because Arjun had pleaded a claim for the same relief which is damages arising out of the same injury against all the four defendants. Arjun did not claim separate of different relief for a separate or different injury against each defendant, and there was no terms in the consent order to the effect that Arjun had reserved his rights to sue the remaining defendant, ie Dr Teoh.
>
> [79] I am unable to agree. *In my view, there is no accord and satisfaction as claimed by Dr Teoh with regard to Arjun's cause of action against her. Arjun had never dropped his case against her. In her settlement between Arjun and the other defendants, there was no admission of liability. It must be emphasised that the ex gratia payment was not a payment that was legally required. I agree with learned counsel for Arjun, Miss PA Sharon that the parties never paid the said amount as a satisfaction because there was no admission of guilt. They gave it as a gift to Arjun.*
>
> [80] Added to that, I agree with learned counsel for Arjun that Dr Teoh ought to be liable for her own negligence. (Emphasis added.)

[84] We agree with the reasoning of the learned trial judge based on the following reasons. A

[85] It is pertinent to note that a consent judgment is regarded in law merely as a contract between the parties but superadded with the command of the court (see *Khaw Poh Chhuan v Ng Gaik Peng & Ors* [1996] 1 MLJ 761; [1996] 2 CLJ 185 (SC), and *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301 (FC)). B

[86] Therefore, in determining whether the consent judgment recorded between the plaintiff and the other defendants should result in the plaintiff's action against the second defendant being fully satisfied and extinguished, the terms in the consent judgment ought to be looked into. C

[87] We agree and adopt the principles enunciated by the UK Court of Appeal case of *Vanden Recycling Ltd v Kras Recycling BV* [2017] EWCA Civ 354, which was relied upon by the learned counsel for the second defendant. The following passages of the judgment are self-explanatory: D

> 39. As set out in Halsbury's Laws, Vol 97 at paragraph 449: E
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> > *Judgment recovered against any person liable in respect of any debt or damage is not a bar to an action, or to the continuance of an action, against any other person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage.* However, *a satisfied judgment* (except in the case of a foreign judgment) *is a bar to a claim against other tortfeasors, whether joint or several, who are liable for the same damage.* F
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> 40. Satisfaction of a settlement agreement as opposed to a judgment will only have this effect *if the sum agreed and paid was intended to fix the full measure of the claimant's loss.*
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> 41. As further stated in paragraph 449 of Halsbury's Laws: G
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> > *... acceptance of a settlement from one tortfeasor bars continuance of proceedings against another, whether the liability is joint or several, if the entire sum agreed upon is received and it was intended to be in full satisfaction of the claim.* In such a case, the compromise fixes the claim as if judgment had been given, and the claimant cannot subsequently contend that the settlement figure fell short of the claim's full value and thereby justify proceedings against another tortfeasor. (Emphasis added.) H

[88] Further down the judgment, it was stated that: I

> *In considering whether a sum accepted under a compromise agreement should be taken to fix the full measure of A's loss,* so as to preclude action against C in tort in respect of the same damage, and so as to restrict any action against C in contract in respect of the same damage to a claim for nominal damages, *the terms of the settlement agreement between A and B must be the primary focus of attention, and the agreement*

must be construed in its appropriate factual context. In construing it various significant points must in my opinion be borne clearly in mind:

(1) *The release of one concurrent tortfeasor does not have the effect in law of releasing another concurrent tortfeasor* and the release of one contract-breaker does not have the effect in law of releasing a successive contract-breaker.

(2) *An agreement made between A and B will not affect A's rights against C unless* either (a) *A agrees to forgo or waive rights which he would otherwise enjoy against C,* in which case his agreement is enforceable by B, or (b) the agreement falls within that limited class of contracts which either at common law or by virtue of the Contracts (Rights of Third Parties) Act 1999 is enforceable by C as a third party.

(3) *The use of clear and comprehensive language to preclude the pursuit of claims and cross-claims as between A and B has little bearing on the question whether the agreement represents the full measure of A's loss.* The more inadequate the compensation agreed to be paid by B, the greater the need for B to protect himself against any possibility of further action by A to obtain a full measure of redress.

(4) *While an express reservation by A of his right to sue C will fortify the inference that A is not treating the sum recovered from B as representing the full measure of his loss, the absence ofsuch a reservation is oflesserand perhaps ofno significance, since there is no need for A to reserve a right to do that which A is in the ordinary way fully entitled to do without any such reservation.*

(5) If B, on compromising A's claim, wishes to protect himself against any claim against him by C claiming contribution, he may achieve that end either (a) byobtaining an enforceable undertaking byA not to pursue any claim against C relating to the subject matter of the compromise, or (b) by obtaining an indemnity from A against any liability to which B may become subject reiating to the subject matter of the compromise. (Emphasis added.)

[89] Turning to the facts of this case, it is apparent from the consent judgment that it was entered without any admission as to liability. The consent judgment was intended to be an *ex gratia* payment as a full and final settlement of any claim that the plaintiff had against the other defendants.

[90] In our view, the absence of express reservation by the plaintiff to proceed with his right to sue the second defendant, as contended by the learned counsel for the second defendant, bears no significance since the plaintiff is entitled to do so even without such express reservations.

[91] Based on the proper reading of the terms in the consent judgment, it is patently clear to us that the sum agreed upon and paid by the other defendants

was not intended to be in full satisfaction of the plaintiff's claim, and the plaintiff's claim against the second defendant was not yet satisfied and had not yet extinguished.

[92] Based on the above, we are of the considered view that there is no merit to this issue.

[93] In a nutshell, we do not see any merits in all of the above issues raised by the learned counsel for the second defendant, which we dealt with at the outset of this appeal. We hereby dismiss these issues for lack of merit.

First issue: Standard of care

[94] The learned counsel for the second defendant submitted that the learned trial judge failed to apply the *Bolam* test correctly in this case.

[95] We are of the view that the issue of the correct standard of care in medical negligence cases in Malaysia has been resolved by the Federal Court in *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605.

[96] Firstly, the Federal Court in *Zulhasnimar* decided that the *Bolam* test, as qualified in *Bolitho*'s case, is applicable to the standard of care expected in diagnosis and treatment.

[97] The *Bolam* test was postulated by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 to address the standard of care for doctors who exercise the use of some special skill or competence for their duty of care owed towards their patients. In short, a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art, even though there is a body of opinion that takes a contrary view.

[98] The qualification to the *Bolam* test is that the court may reject or depart from the body of medical opinion, which does not withstand logicai analysis for being unreasonable or irresponsible. This qualification was propounded by the House of Lords in *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151.

[99] Secondly, the Federal Court in *Zulhasnimar* decided that the test in the Australian High Court case of *Rogers v Whitaker* (1992) 175 CLR 479 as adopted in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229 is applicable in the duty to advise risks.

[100] In *Rogers v Whitaker*, the court departed from the *Bolam* test. It was held that it is the court, rather than the body of respected medical practitioners, which should decide on whether a patient has been properly advised of the materiality of the risks associated with a proposed treatment.

[101] In our view, the learned trial judge was correct in referring to the Federal Court case of *Zulhasnimar bt Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 5 MLJ 438; [2017] 8 CLJ 605 pertaining to the correct standard of care to be applied in medical negligence cases in Malaysia.

[102] We do not have the slightest doubt that the learned trial judge had the abovementioned principles in the forefront of her mind when she addressed the legal and factual issues that arose for determination, as can be seen throughout her grounds of judgment.

[103] Therefore, we hold that there is no merit to this issue.

Second issue: The parties' experts

[104] In the present case, two experts testified at the trial. The plaintiff called Dr Manoharan a/l Shunmugam ('PW10'), who is currently a consultant ophthalmologist specialising in adult and paediatric vitreoretinal surgery at Pantai Hospital Kuala Lumpur. The second defendant, on the other hand, called Dr Nor Fariza bt Ngah ('DW3') who is currently a consultant ophthalmologist and a medical Retina Specialist at the Shah Alam General Hospital.

[105] The learned counsel for the second defendant submitted that the learned trial judge had erred when she relied on PW10's expert opinion evidence since PW10 was not a competent and independent expert by reason of his lack of qualification and experience.

[106] This issue was already raised before the learned trial judge below. In her grounds of judgment, the learned trial judge stated that:

> [86] Mr PS Ranjan contended that Dr Manoharan is not a suitable expert. The only competent expert is Dr Fariza. This is because Dr Teoh is an ophthalmologist. Her expert is also an Ophthalmologist and she has special interest in uveitis and the retina. By contrast, Dr Manoharan is a vitreo retinal surgeon. He is a sub-specialist. He was not in practice in Malaysia at the material time in 2008. He was then overseas.
>
> [87] *I am unable to agree that Dr Manoharan is not a competent expert. Dr Manoharan is also a consultant ophthalmologist, just like Dr Fariza and Dr Teoh. The difference is their sub-specialty.* Dr Manoharan is a specialist in Adult and Paediatric Vitreoretinal Surgery while Dr Fariza is a medical retina specialist.

[88] *The management of Arjun's injury involved the issue of vitreoretinal surgery. Recognising as such, Dr Fariza who is not a vitreoretinal surgeon, offered this clarification and explanation.* She said in 1999 until 2002, she was trained as a vitreoretinal surgeon but she decided to take up medical retina instead. She considered that assessment of retinal cases in relation to surgery is one of her expertise as well. She is not at par with Dr Fauzi and the ISEC specialists from their experience doing surgery but she should be able to do as assessment and able to decide on the initial management.

[89] This case involved injury to the right eye of a 14 year old child. Certainly, I would have thought that expert evidence in relation to the eye management of Arjun who had suffered a blunt injury, would be of great assistance to this court one way or another. There is no dispute that Dr Manoharan is a qualified Paediatric Vitreoretinal Surgeon and that he is qualified in VR procedure including complex RD repairs, macular translocations and diabetic delaminations. I have considered the evidence, both oral and documentary, in relation to Dr Manoharan's qualifications and professional experience. *I entertain no slightest doubt that Dr Manoharan is competent and qualified to testify on matters before this court which is within his knowledge, experience and expertise. There is simply no good reason why this court shouid not consider or should disregard Dr Manoharan's expert opinion.* (Emphasis added.)

[107] We share the same view as the learned trial judge. We see no reason to disturb the findings of the learned trial judge pertaining to the above matter.

[108] Next, the learned counsel for the second defendant further submitted that there was no finding by the learned trial judge that DW3 was incompetent in general ophthalmology or that she was not independent so as to reject her expert opinion evidence.

[109] After perusing the learned trial judge's grounds for the decision, the rejection or departure from DW3's expert opinion evidence was not on the grounds of preferring one expert opinion over the other or DW3's lack of expertise. The rejection or departure from DW3's expert opinion evidence was based on the grounds that some specific opinions were found to be unreasonable and were not capable of withstanding logicai analysis.

[110] Firstly, the learned trial judge rejected DW3's expert opinion evidence, which supported the second defendant's diagnosis of ERD for lack of evidential support and not capable of logical analysis. This can be seen in the learned trial judge's grounds of judgment, as follows:

[250] I have carefully considered the evidence presented in this case. *The finding of tobacco dust without more points to RRD. The presence of tobacco dust is pathognomonic for retinal breaks. Thus the chronic retinal detachment suffered by Arjun was RRD, as diagnosed by Dr Fauzi. The diagnosis of ED by Dr Teoh is not acceptable. I reject Dr Fariza's opinion that supported Dr Teoh's diagnosis as the opinion is not capable of*

withstanding logical analysis. (Emphasis added.)

[111] Secondly, the learned trial judge rejected DW3's expert opinion evidence for being unreasonable, that the steroids prescribed by the second defendant to the plaintiff were warranted and acceptable. The following can be seen in the learned trial judge's grounds of decision:

> [339] Coming back to the weight and age factors, *Dr Fariza agreed that the two factors are important because they will accurately tell the doctor how much to give the steroids.*
>
> [340] Taking into account the weight and age factors, Arjun at the material time was 14 years old and of 57.5kg. *The recommendation is 1mg for 1kg and in cases of life threatening and sight threatening, one could go up to 1.5mg.* In my view, *there was no evidence of life threatening or sight threatening so there was no reason for Dr Fariza to compute Arjun's weight of 57 times 1.5mg. Dr Teoh prescribed Arjun 80mg a day of Prednisolone from 22 December 2008 to 5 January 2009.*
>
> [341] In the circumstances, I agree with Miss PA Sharon that Dr Teoh had given him over the limit suggested and recommended by doctors. Those were excessive doses of steroids.
>
> [342] *In light of the evidence by Dr Manoharan, Dr Kok and Dr Wong, I am unable to accept as reasonable Dr Fariza's evidence that the steroids used by Dr Teoh was warranted and acceptabie.* (Emphasis added.)

[112] In our view, the learned trial judge is entitled to reject or depart from the opinion of the second defendant's expert evidence if the opinion does not withstand logical analysis, as clearly stated in *Bolitho*'s case.

[113] We also found that the learned trial judge had also taken into consideration ali relevant evidence before deciding the same. We do not see any reason to disturb the finding of the learned trial judge.

[114] Therefore, we do not see any merit in this issue raised by the learned counsel for the second defendant and dismiss the same.

Third issue: Causation

[115] The learned counsel for the second defendant submitted that the learned trial judge erred in her findings that the second defendant caused the plaintiff's partial loss of vision. According to the learned counsel for the second defendant, the plaintiff's partial loss of vision in one eye arose from the tennis ball injury complicated by the surgeries performed by two non-defendants, none of which was caused by the second defendant. The learned counsel for the plaintiff contended otherwise.

[116] Pertaining to the issue of causation, we are of the view that the learned

trial judge was correct when she referred to the case of *Elizabeth Chin Yew Kim & Anor v Dato' Ong Gim Huat (sued as public officer of Hospital Lam Wah Ee) and other appeals* [2017] 1 MLJ 328; [2017] 2 CLJ 274. In this case, Harmindar Singh Dhaliwal CJA (now FCJ), in delivering the judgment of this court, held as follows:

> [34] *The principle of causation is concerned with the relationship between the tortious act and the injury sustained.* There must be a causal connection between the breach of duty and the injury suffered. Now proof of causation can often be onerous for the injured patient as he or she is in most cases in a disadvantaged position when compared to the treating medical practitioner.
>
> [35] Nevertheless, the law places a burden on the plaintiff to prove on a balance of probabilities, as in the instant case, that it was the first defendant's breach of duty which caused the injuries to the infant. *Put another way, there must be proof that if there was no breach by the first defendant in his failure to apply the McRobert's manoeuvre and supra-pubic pressure, the infant would not have suffered the injuries that were sustained.*
>
> [36] In this regard, the courts often look to the test of causation commonly known as the 'but for' test. It simply means *that 'but for' the defendant's negligent act, the injury would not have occurred.* It is in essence, a factual inquiry and in medical negligence cases, *it is often resolved through expert evidence.* (Emphasis added.)

[117] It is thus incumbent upon the plaintiff in the present case to show the relationship between the second defendant's breach of her duty of care and the injuries suffered by the plaintiff. In other words, the plaintiff must show that, but for the second defendant's negligent act, the plaintiff would not have suffered the injury.

[118] Based on the evidence, the learned trial judge found that the second defendant had breached her duty of care towards the plaintiff when she had, among others:

(a) misdiagnosed the plaintiff's injury by reason of her failure to manage the plaintiff's case properly as expected of her (para 251);

(b) failed to pick up the symptoms and signs of RRD (para 255);

(c) did not use any of the readily accessible diagnostic equipment such as OCT Scan, FFA or B Scan, which would have otherwise assisted the second defendant in adequately and properly monitoring the plaintiff's eye condition (para 260);

(d) failure to monitor the plaintiff's injury adequately, which resulted in undermining the reasonableness of the second defendant's diagnosis (para 259);

(e) did not reconsider her diagnosis even after knowing PW6's diagnosis (para 271);

(f) stopped the proposed surgery on 23 December 2008 which was suggested by PW6 (para 274);

(g) failed to inform the plaintiff and his parents of the material risk in his medical management, therefore depriving him of making an informed decision whether to proceed with the second defendant's management of his eye injury (para 277); and

(h) failed to monitor the plaintiff's IOP at every visit, and her explanation to wait for cupping in the optic disc (which is a symptom of glaucoma) was unreasonable (paras 334–335).

[119] Furthermore, the learned trial judge accepted both PW10's and DW3's expert opinion evidence that the tennis ball blunt injury to the plaintiff's eye, which caused traumatic hyphaema and traumatic mydriasis, was significantly serious, and DW3 herself agreed that a follow-up was mandatory.

[120] However, after the plaintiff had consulted the second defendant concerning his injury, the second defendant discharged the plaintiff without a follow-up. Even though denied by the second defendant, we agree with the learned trial judge that there is nothing in the evidence to show that an appointment date was given to the plaintiff for a follow-up on his condition.

[121] In addition, we agree with the learned trial judge that there is no dispute that the plaintiff was confirmed to have had a retinal detachment subsequent to the plaintiff's consultation with PW6. The question is whether the plaintiff's retinal detachment was RRD (as per PW6) or ERD as per the (second defendant). This will affect the plaintiff's treatment, as ERD can be treated without any surgical intervention, and RRD requires surgical intervention.

[122] We are of the view that the learned trial judge had duly considered all evidence, including expert evidence, in holding that the plaintiff had suffered RRD. Still, the second defendant was adamant and did not reconsider her diagnosis even after the finding of PW6 that there was tobacco dust in the plaintiff's eye, which shows a very high likelihood of the plaintiff suffering from RRD.

[123] In fact, the plaintiff did not proceed with the surgery after consulting the second defendant for her advice. It was the learned trial judge's finding of fact that it was the second defendant who thought that surgical intervention was not necessary. It was not the case that the plaintiff's parents were opposing the surgery as they were only reliant on the advice of the second defendant. This can be seen in the evidence.

[124] Ultimately, the learned trial judge found, and we agree, that the second defendant was responsible for putting an end to the plaintiff's early chance of recovery of his right eye vision by maintaining that surgery was not necessary.

[125] On another note, the learned trial judge was mindful that the plaintiff had also suffered from PSC and glaucoma. The learned trial judge had painstakingly considered the number of dosages of steroids prescribed by the second defendant to the plaintiff throughout his care under the second defendant (paras 289–315) and that these steroids were the cause of PSC and glaucoma suffered by the plaintiff (paras 350–391).

[126] Based on the evidence, the second defendant was also aware of the inherent and material risk in her treatment and the number of steroids prescribed to the plaintiff. As such, the injury suffered by the plaintiff is foreseeable to the second defendant, but she failed to inform the plaintiff of the material risk (paras 343–349).

[127] Based on the evidence, the finding of the learned trial judge that the steroids prescribed to the plaintiff by the second defendant were excessive was supported by the expert opinion evidence, as can be seen below:

> [318] Dr Manoharan opined that the steroids given by Dr Teoh was excessive. In his expert report, Dr Manoharan said 'In fact the plaintiff reports that he was on steroids for circa *seven months until this was stopped by Dr Kok. This duration of steroids and the dose of 40mg twice a day appears excessive and can have severe systemic effects which can be life-threatening.* Furthermore, Dr Raveendran reported no systemic autoimmune findings from his assessment. This should have prompted a re-visit of the diagnosis. (Emphasis added.)

[128] It is, therefore, clear to us that, but for the second defendant's breaches of her duty of care towards the plaintiff, the plaintiff would not have suffered from PSC and glaucoma and partial loss of his right vision.

[129] In our view, blaming the initial blunt injury to the eye or the surgical intervention by other doctors does not absolve the second defendant from properly discharging her duty of care towards the plaintiff in terms of diagnosis, treatment, and advice.

[130] In a nutshell, we disagree with the learned counsel for the second defendant that there was no causation between the plaintiff's injury and the breach of the second defendant's duty of care.

A Conclusion on the issue of liability

[131] In conclusion, based on all of the above, we find that there is no merit in the second defendant's appeal against liability.

B Fourth issue: Quantum of damages

[132] In the present case, the learned trial judge allowed the plaintiff's claim as per the following:

C (a) special damages of RM33,324;

(b) general damages for pain and suffering and loss of amenities of lifeof RM200,000;

(c) aggravated damages of RM400,000;

D (d) future general damages of RM500,000; and

(e) costs for getting up in the sum of RM250,000 and expenses in the sum of RM50,000.

E **[133]** It is trite that an appellate court is slow to interfere with the quantum of damages awarded by the trial court unless it can be shown that there is an erroneous estimate of the amount of the damages, which may happen eitherthrough an omission to considersome relevant materials or an admission of irrelevant considerations.

F **[134]** We refer to the case of *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22; [1985] CLJ Rep 323, in which the Federal Court, speaking through Abdul Hamid Omar CJ (Malaya) (as he then was), held as follows:

G Now, in an appeal on quantum of damages, it is essential in order to come to a conclusion to bear in mind certain principles which are well established. *The Appeal Court is slow, indeed, disinclined to interfere with the judge's finding merely because the Appeal Court thinks that if the case had been before it in the first instance a lesser sum would have been awarded, Azmi CJ (Malaya) (as he then was) giving the judgment of the Federal Court in Topaiwah v Salleh* [1968] 1 MLJ 284; [1968] CLJU 161; [1968] 1 LNS 161 said that:

H

> In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that *this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled* (see *Flint v Lovell* [1935] 1 KB 354).

I In *Greenfield v London and North Eastern Railway Company* [1945] KB 89, MacKinnon LJ had this to say:

> The principle on which the Court of Appeal reviews the assessment of damages,

whether too high or too low, is not because the Court of Appeal might have given rather more or rather less, but only: (1) if the judge has omitted some relevant consideration or admitted some irrelevant consideration, or (2) if the amount is so excessive, or insufficient, as to be plainly unreasonable.

Lord Evershed MR in *Wilson v Pillay* [1957] 3 All ER 525 at p 526 emphasised that:

... interference by this Court with an award of damages by the trial Judge must be a rare thing, and may I say that it should be perhaps even rarer in relatively small cases tried in the County Court. No one would suggest that, because this Court thought that the damages, small in any case, were rather on the low side, this Court could conseder for a moment slightly raising the figure or adopting the converse course in a different kind ofcase. In other words, the onus on an appellant seeking to interfere with an award of damages, particularly within this sort of scale, is a heavy one.

We would also refer to *Elliot v Preston* [1971] 2 Lloyds Rep 328 where Salmon LJ had this to say:

Before we can interfere, there has to be (in the phrase which is hallowed, but has now I think a rather archaic ring) a wholly erroneous estimate of damage. That I have always regarded as meaning that a court has to be satisfied that it is very wrong. If you are satisfied that it is wrong, and seriously wrong, then not only is this court entitled to interfere, but it is its duty to interfere. I would agree ... that you cannot say, if it is wrong by such and such a per cent, you do interfere, and ifit is not you do not I think each case stands by itself, and a great deal depends upon the amount of the award.

The principle that should guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case in particular the amount of the award. In a particular case therefore *it is for the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage in that, either there was an omission on the part of the judge to consider some relevant materials, or he had admitted for purpose of assessment some irrelevant considerations.* If the court is satisfied or convinced that the judge has acted upon wrong principle of law then it is justified in reversing; indeed, it is its duty to reverse the finding of the trial judge. (Emphasis added.)

[135] It is also important to note that damages in tort are compensatory in nature. In *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685; [2017] 10 CLJ 529, Md Raus Sharif CJ (as he then was) speaking for the Federal Court held as follows:

[105] *It is trite that damages in tort are compensatory in nature. The tortfeasor is liable for all natural and direct consequences flowing from the wrongful act.* The damages awarded for such *consequences include special damages for those items which can be precisely measured in monetary terms, and general damages for those items not capable of exact calculation such as for pain and suffering or future losses.*

A [106] *The general rule in awarding damages is to put the injured party in the same position as he would have been in if he had not sustained the wrong.* The injured party is prima facie entitled to be compensated for his net loss; financial benefits accruing to him which he would not have received but for the tort should be taken into account and set off against the claim for damages (*Halsbury's Laws of England* (5th reprint) at paras 341–347). (Emphasis added.)

B

[136] Bearing in mind the above position of the law, we now proceed to deal with the second defendant's appeal against the quantum of damages.

C **[137]** Firstly, we affirm the special damages awarded by the learned trial judge of RM33,324, which was supported by evidence. We reject the learned counsel for the second defendant's submission that the expenses claimed were incurred based on the negligent act of all the other defendants but herself, as the issue of the second defendant's liability had been duly established.

D

[138] With regard to the award of general damages for pain and suffering and loss of amenities of life of RM200,000, we have perused the learned trial judge's reasoning behind granting the award (parags 400–411).

E **[139]** We agree with the learned counsel for the second defendant that it is manifestly excessive. In the Bar Council's *Revised Compendium of Personal Injury Awards 2018*, the range is between RM30,000 and RM72,000 for 50% to 80% up to 100% loss of vision in one eye. We are of the view that RM100,000 is fair and reasonable based on the facts of the present case. With this, we vary the award for general damages from RM200,000 to RM100,000.

F

[140] We set aside the learned trial judge's award for aggravated damages of RM400,000 as it was not pleaded by the plaintiff (see *Tenaga Nasional Bhd (TNB) v Evergrowth Aquaculture Sdn Bhd and other appeals* [2021] 5 MLJ 937; [2021] 9 CLJ 179 (FC) and *Nur Farzana Aida bt Faizal (claiming through his father, Faizal bin Mad Saat) & Ors v Kerajaan Malaysia* [2021] MLJU 2423; [2022] 1 CLJ 692 (CA)).

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H **[141]** We also set aside the learned trial judge's award for future general damages for the sum of RM500,000, which is purely speculative and lacks evidence.

[142] It is trite that the award of costs remains at the discretion of the court. I The guidelines to determine the amount of the getting up fees are set out in O 59 of the Rules of High Court 1980 (presently O 59 r 16(1) of the Rules of Court 2012) which states:

> 16(1) In assessing the costs payable in relation to any item, the Court shall have regard to all relevant circumstances, and in particular to —

(a) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(b) the skill, specialized knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(c) the number and importance of the documents, however brief, prepared or perused;

(d) the place and circumstances in which the business involved is transacted;

(e) the importance of the cause or matter to the client;

(f) where money orproperty is involved, its amount or value;

(g) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

[143] See also *Yong Teck Lee v Harris Mohd Salleh & Anor* [2009] 6 MLJ 437; [2010] 1 CLJ 156 (FC).

[144] In allowing costs of RM250,000 for getting up fees and RM50,000 for out-of-pocket expenses to the plaintiff, the learned trial judge had considered the complexity of the factual matrix of this case including the difficulty and the novelty of the question involved. The learned trial judge also took into consideration the required skill and specialised knowledge required in the area of both law and medicine in the present case.

[145] There was nothing to show that the learned trial judge had erred in awarding this sum to the plaintiff. Therefore, we see no reason to disturb the same. Hence, the award for costs of RM250,000 for getting up fees and RM50,000 for out-of-pocket expenses to the plaintiff is affirmed.

CONCLUSION

[146] In conclusion, based on all of the reasons above, we found that there is no merit in the second defendant's appeal against liability. Therefore, the second defendant's appeal on liability is dismissed, and consequently, the learned trial judge's decision on liability is affirmed.

[147] With regard to the second defendant's appeal against the quantum of damages, we vary the order of the learned trial judge as per the following:

(a) special damages of RM33,324 is affirmed;

(b) general damages for pain and suffering and loss of amenities of life varied from RM200,000 to RM100,000;

(c) costs for getting up in the sum of RM250,000 and expenses in the sum of RM50,000 is affirmed;

(d) aggravated damages of RM400,000 is set aside; and

(e) future general damages of RM500,000 is set aside.

(f) on interest:

(i) for general damages, 4% from the date of filing the writ (29 August 2014) to the date of judgment;

(ii) for special damages, 4% from 19 December 2008 to date of judgment; and

(iii) thereafter for the judgment sum, 5% from the date of judgment to the date of payment.

[148] We, therefore, allow the appellante appeal in part with no order as to cost.

Order accordingly.

Reported by Ashok Kumar